

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* P. J. MASCH, Minor.

UNPUBLISHED  
June 21, 2016

No. 330622  
Arenac Circuit Court  
Family Division  
LC No. 14-012782-NA

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Before: MARKEY, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Respondent-mother appeals by right the trial court’s order terminating her parental rights to the minor child under MCL 712A.19b(3)(c)(i) (conditions that caused adjudication continue to exist), MCL 712A.19b(3)(c)(ii) (other conditions exist causing adjudication and parent has not rectified), MCL 712A.19b(3)(g) (failure to provide proper care and custody), and MCL 712A.19b(3)(j) (reasonable likelihood of harm). We affirm.

I. FACTUAL BACKGROUND

This case began in October of 2014 after respondent was arrested in Livingston County for selling controlled substances. The child was found in Arenac County residing with his maternal grandmother, Susan Masch. DHHS initiated proceedings in this case because of respondent’s incarceration and concerns regarding domestic violence in respondent’s home perpetrated by her live-in boyfriend, Weston King. Shortly after respondent’s arrest she executed a durable power of attorney granting Susan and her husband the authority to act as the child’s parents in all respects. The power of attorney stated that “it shall continue in effect until my death or until I revoke it in writing.”<sup>1</sup> While the author of the petition to initiate proceedings, Keith Asbury, testified that petitioner knew about the power of attorney around the time the petition was filed, the trial court did not become aware of it until it was presented by respondent’s counsel at the November 6, 2015 termination hearing. At a November 6, 2014 pre-trial hearing, respondent admitted to allegations in the petition that she was arrested for selling

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<sup>1</sup> Such a power of attorney is only valid for a period not exceeding six months, unless the parent is a member of the military and only while on deployment in a foreign nation. MCL 700.5103.

controlled substances, faced 5 felony counts related to this arrest, had a history of domestic violence, and she acknowledged an incident in August of 2014 where King pointed a gun at her head and attempted to hang himself. Respondent personally informed the court that she was making the admissions of her own free will and that doing so was her own personal decision. Through counsel, respondent indicated that she believed the admissions she made were sufficient for the trial court to assume jurisdiction. The trial court accepted respondent's plea and assumed jurisdiction.

Respondent participated in several programs while in jail including a parenting class, "Moral Recognition Therapy," and AA/NA. Respondent also attended bible study and church while in jail. She was released from jail and placed on probation in February 2015. One condition of respondent's probation was that she have no contact with King. After her release, respondent moved in with her friend, Kelly Melby. Respondent testified that she helped Melby with bills from time to time and that her main expenses were food and fuel. Petitioner provided gas cards and a hotel room so that respondent could attend a hearing in Arenac County on February 26, 2015. Petitioner gave respondent several more gas cards totaling \$100 through early March when respondent became employed at Taco Bell. According to respondent, she was two weeks away from receiving her first paycheck when she was cut off from gas assistance. The trial court determined that without having to pay rent, she should have been able to afford gas money to visit the child. Nevertheless, respondent missed several visits either because she did not have gas money, her car was not running or she did not have proper licenses and insurance.

Outside of attending several therapy sessions, respondent did not participate in services after her release from jail. Respondent testified that she had difficulty making alternate arrangements for services when she was working full time because petitioner or service providers would not respond to her. DHHS employee Lynelle Frasher testified that it was respondent who did not follow through with making the appropriate effort to attend services. During an August 20, 2015 permanency planning hearing, the trial court stated that it had received information about the child having a gun pointed to his head. Asbury later testified at the termination hearing that the child had informed petitioner that King had pointed a gun to his head and had pulled swords out on him. Asbury did not indicate when the child made this revelation. It was at the permanency planning hearing that the trial court authorized the filing of a petition to terminate respondent's parental rights.

At some point after the August 20, 2015 hearing, respondent was again incarcerated for 27 days for violating the terms of her probation by having contact with King. During the first day scheduled for the termination hearing, October 15, 2015, respondent informed the trial court that she believed she had been inadequately represented by her attorney and that she was requesting alternative counsel. The trial court agreed to adjourn the hearing until November 6, 2015, so that respondent could find new counsel. Respondent's new counsel informed the trial court of the power of attorney at the start of the November 6, 2015 termination hearing. The trial court, however, declined respondent's request to revisit the issue of jurisdiction.

The child's therapist testified at the termination hearing that the child suffered from ADHD and PTSD, the latter of which resulted from witnessing domestic violence. The child's therapist also testified about the anxiety the child faced from unanswered questions in his life,

such as the identity of his father. She testified that the child had anger that was directed at respondent due to these unanswered questions, but that the child and respondent did love each other. Asbury testified about the circumstances that led to the initiation of proceedings. Specifically regarding the power of attorney, Asbury testified that he was aware of it but that petitioner's policy was to proceed with initiating proceedings notwithstanding a power of attorney in cases involving abuse and neglect. Asbury also stated that petitioner had information at the time that indicated that respondent had threatened to take the child out of state when she was released from jail. Frasher testified generally about what she believed to be inadequacies in respondent's participation with services and in attending visits. Frasher testified that petitioner had intercepted calls between respondent and King wherein they discussed ways to "outsmart the system." While Frasher acknowledged that respondent completed some services while in jail, she stated her belief that respondent had not benefitted from those services.

Respondent testified that she missed visits with the child due to financial difficulties involved in the travel from Livingston County to Arenac County and petitioner's refusal to extend her further help. Respondent also stated that petitioner and service providers did not adequately work with her to locate services that would complement her work schedule. Respondent acknowledged that she had not been able to work at Taco Bell full time since her probation violation. Twice during respondent's testimony her personal cell phone rang. Upon inquiry from petitioner, respondent acknowledged that the two calls had come from the "Parnell Facility" where King was incarcerated. Respondent testified that she had broken up with King after the October 15, 2015 hearing but that it had taken several phone calls due to his persistence. Respondent acknowledged that she continued to take phone calls from King, including one the morning before the hearing, and that she still loved King. Respondent stated that she had rejected a "thousand times" more calls from King than what she had accepted and that she was dating other men. Melby also testified to hearing respondent break up with King over the phone. Throughout these proceedings, the child continued to reside with Susan and her husband.

The trial court began its oral opinion by stating that it believed petitioner's efforts had been excellent and that respondent had been offered extensive services. The trial court found that there was horrendous domestic violence in this case. It stated that respondent should have attended more visits. The trial court also concluded that respondent relied on friends to subsidize her housing and other needs and that she had not completely rejected King. The trial court first found that termination was warranted under MCL 712A.19b(3)(c)(i) (conditions that caused adjudication continue to exist), noting respondent's incarceration, inability to care for the child, involvement with domestic violence, and failure to protect the child. The trial court stated that respondent's participation in services was sporadic at best and that she continued to struggle with the barrier that existed at the case's beginning, i.e., King. The trial court next found that termination was warranted under MCL 712A.19b(3)(c)(ii) (other conditions exist causing adjudication and parent has not rectified) and noted the same factors that applied to section (3)(c)(i) applied here. Additionally, it stated that respondent had the capabilities but had not followed through, noting her success during time in jail but failure after her release.

The trial court next found that termination was warranted under MCL 712A.19b(3)(g) (failure to provide proper care and custody), stating that it would reincorporate its previous findings. Lastly, the trial court found that termination was warranted under MCL 712A.19b(3)(j) (reasonable likelihood of harm), stating that respondent lacked the instinct to protect and that she

did not understand the danger that King presented. The trial court found that termination of respondent's parental rights was in the child's best interests because he needed permanency and stability. The trial court noted the strong bond between respondent and the child, but also reiterated its concerns about King and stated it was convinced that respondent's relationship with him would not end.

Respondent now brings this appeal, arguing that the trial court erred in exercising jurisdiction because she signed the power of attorney and that her trial counsel was ineffective for failing to introduce the power of attorney at adjudication and for encouraging her to consent to adjudication. She further claims the trial court erred in finding that statutory grounds for termination existed and in determining that termination of her parental rights was in the child's best interests.

## II. STANDARD OF REVIEW

We review the trial court's decision to exercise jurisdiction "for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). We review respondent's claim of ineffective assistance of counsel as a constitutional question of whether respondent was afforded procedural due process, and as such, we review this issue *de novo*. See *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014); *Reist v Bay Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976); *In re Osborne (On Remand)*, 239 Mich App 597, 606; 603 NW2d 824 (1999). We review the order terminating parental rights under the clearly erroneous standard. MCR 3.977(K). We review the trial court's decision that termination is in the best interests of the children for clear error. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144, lv den 492 Mich 859 (2012). A decision of the trial court is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

## III. ANALYSIS

### A. ADJUDICATION

"The adjudicative phase determines whether the probate court may exercise jurisdiction over the child." *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). The trial court must determine by a preponderance of the evidence that the child comes within the requirements of MCL 712A.2 to acquire jurisdiction. *Id.* at 108-109. To appeal alleged claims of error concerning the trial court's exercise of jurisdiction, a party must directly appeal the decision of the trial court establishing jurisdiction. *In re Kanjia*, 308 Mich App 660, 667; 866 NW2d 862 (2014). A party cannot collaterally attack a trial court's exercise of jurisdiction in an appeal from an order terminating that party's parental rights. *In re Hatcher*, 443 Mich 426, 437-440, 444; 505 NW2d 834 (1993). There are two general exceptions to this rule. The first is when termination occurs at the initial disposition. *In re SLH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008). The second is when a respondent directly attacks a trial court's exercise of its dispositional authority by arguing that it proceeded to a termination hearing without first having afforded the respondent an adjudication hearing that provided sufficient due process. *In re Kanjia*, 308 Mich App at 669-670.

Neither of the two exceptions to the rule applies to the present issue. Respondent has not argued that in adjudicating her despite the power of attorney, the trial court deprived her of her constitutional due process rights. Rather, respondent merely argues that the power of attorney precluded her from falling into the statutory grounds in MCL 712A.2(b) that justify adjudication. Additionally, respondent's parental rights were not terminated at the first dispositional hearing; therefore, respondent cannot argue in this appeal of the order terminating her parental rights that there was no statutory basis under MCL 712A.2(b) to exercise jurisdiction.

#### B. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent argues that she was denied the effective assistance of counsel at the adjudication trial. Respondent's claim that counsel was ineffective by failing to advise the trial court of the existence of the power of attorney and by allowing her to plead no contest to certain of the allegations at the adjudication is an improper attack on the trial court's assumption of jurisdiction, which should have been raised in a direct appeal. *In re Hatcher*, 443 Mich at 437-440, 444; *In re SLH*, 277 Mich App at 668.

#### C. STATUTORY GROUNDS

Petitioner bears the burden of proving the existence of at least one of the Legislature's enumerated conditions to terminate a parent's parental rights by clear and convincing evidence. *In re JK*, 468 Mich at 209. We also recognize the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). To overturn the trial court, this Court must find that its decision was more than just possibly or even probably wrong. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). Only one statutory ground is necessary to support terminating parental rights. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

The trial court first found that termination was proper under MCL 712A.19b(3)(c)(i), which provides for termination if the conditions that led to the initial adjudication continue to exist 182 days after the initial dispositional order and "there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." The issues that were present in this case at the time of the initial adjudication were that respondent had been in an abusive relationship where she was unable to protect the child from injury and that due to her incarceration she was unable to provide proper care and custody for the child. The trial court stated that the facts that supported its conclusion under this statutory ground were that it believed respondent would fail to protect the child and still be engaged in a relationship with domestic violence and its belief that she would be unable to provide care and custody. The trial court's concern that respondent would not be able to provide proper care and custody was supported by Frasher's testimony that respondent had not followed through with services after being released from jail. Failure to comply with a service plan is evidence of a failure to provide proper care and custody. *In re JK*, 468 Mich at 214.

The trial court's concern about King and whether he would continue to be a threat to the child was supported by the evidence. Respondent admitted that she had spoken with King the morning of the termination hearing and that she loved him. Given this testimony, the trial court

did not clearly err when it chose to not believe respondent's and Melby's testimony that respondent was no longer dating King. Moreover, given the continued presence of King in respondent's life, the trial court did not clearly err in concluding that one of the conditions that led to adjudication continued to exist and that there was no reasonable likelihood the condition would be rectified within a reasonable time. Because we find that the trial court did not clearly err in finding a statutory grounds for termination under MCL 712A.19b(3)(c)(i), and because only one statutory ground is necessary to support terminating parental rights, *In re Powers*, 244 Mich App at 118, we need not examine the remaining grounds to uphold the trial court's conclusion that a statutory basis existed to terminate respondent's parental rights.

#### D. BEST INTERESTS

“If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.” MCL 712A.19b(5). The trial court must find by a preponderance of the evidence that termination is in the best interests of the children. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). Again, we must recognize the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *In re Miller*, 433 Mich at 337. The child's bond to the parent, the parent's parenting ability, and the child's need for permanency, stability, and finality are all factors for the court to consider in deciding whether termination is in the best interests of the child. *In re Olive/Metts Minors*, 297 Mich App at 41-42.

The trial court found that termination was in the child's best interests because he needed permanency and stability. The trial court also reiterated its concern that King would be back in the child's life and that respondent's relationship with King would continue. These findings are not clearly erroneous. Again, the evidence showed that at best it had taken respondent 3 months to finally end a relationship with a man who had threatened both her and her son with a gun, and at worst it showed that she was actively conspiring with this man to “outsmart the system.” Either scenario shows that termination would be in the child's best interests. Therapist Paula Suchololski testified that the child suffered from ADHD and PTSD. The trial court did not err in concluding that the risks of allowing respondent to keep her parental rights were too great when balanced against the child's need for a safe, stable, and permanent environment. We conclude that the trial court did not clearly err when it found that terminating respondent's parental rights was in the child's best interests.

We affirm.

/s/ Jane E. Markey  
/s/ Donald S. Owens  
/s/ Mark T. Boonstra